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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DIANA OLSEN-ALLEN,	
Plaintiff and Appellant,	**A126526**
v.	
CITY OF OAKLAND,	**(Alameda County Super. Ct. No. RG08-368694)**
Defendant and Respondent.	

Plaintiff Diana Olsen-Allen (appellant) appeals a summary judgment in favor of defendant City of Oakland (respondent) in her action for defamation. Appellant contends summary judgment was improperly granted. We reject the contention and affirm.

BACKGROUND

Respondent employed appellant as a family advocate for the Head Start program. Marilyn Williams-Reynolds supervised appellant from November or December 2003 until sometime in 2004.

From November 1 through December 31, 2004, appellant was on Workers' Compensation leave and did not draw a paycheck from respondent. In November 2004, she contacted Susan Firtch of the Burnham Brown law firm to find out if Burnham Brown was going to donate gifts for the Christmas holiday. During their conversation, it was agreed that Burnham Brown would donate gifts to the Head Start program.

In November or December 2004, appellant informed Lois Gomes, respondent's director of the Manzanita Recreation Center (MRC), appellant had made arrangements to have Burnham Brown donate Christmas gifts for needy Head Start families. Appellant told Williams-Reynolds to ask Shauntel Gullatt, the acting family advocate, to make a list

of all children at the MRC and their siblings. Gullatt put together a list of 34 needy families at the MRC and gave the list to appellant. Appellant added a family with nine members to the list although the family was not a Head Start family.[1] She then gave the list to Firtch.

Firtch arranged with Burnham Brown to purchase gifts for all of the families on the list. Appellant picked up the gifts from Burnham Brown's downtown Oakland office, transported the sealed and tagged bags from Burnham Brown to her home, and put them in her downstairs family room. They remained there for about 10 days until they were transported to the MRC.

Some time after the Christmas party, Firtch contacted appellant and said that some of the gifts donated by Burnham Brown had "gone missing." In what appellant describes as a " 'snowball effect,' " others became aware of the allegation that donations went missing. Firtch alerted Head Start area coordinator Betty Gibson, and Gibson alerted family services coordinator Michelle Henry.[2] According to appellant, Gomes said she had heard rumors that appellant had stolen the missing Burnham Brown gifts. Appellant contends that Gomes and Williams-Reynolds indicated that Gullatt accused appellant of stealing the Burnham Brown gifts. Neither Gomes nor Williams-Reynolds accused appellant of taking the missing donation items.

On one occasion, Gomes met with Head Start program staff members to try to figure out what happened to the missing gifts. A member of Head Start's personnel department asked both Gullatt and Williams-Reynolds to give statements about their knowledge of the events leading up to the discovery that some gifts were missing and information they had about the missing gifts.

During a conversation between Williams-Reynolds and Gullatt concerning the missing gifts, Gullatt said that, based on her past experiences with people who use drugs,

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[1] Elsewhere, the record states that appellant added the names of nine additional *families* to the list.

[2] Elsewhere in the record, Henry is referred to as a Head Start program supervisor.

"I think [appellant is] on drugs." Thereafter, Williams-Reynolds informed appellant of Gullatt's statement and asked appellant if she was "on drugs." Appellant told Williams-Reynolds that she was using prescription painkillers for an injury but was not using any illegal drugs.

On February 3, 2005, Andrea Youngdahl, director of respondent's human services department, sent appellant a written notice of respondent's intent to terminate her. The February 3 letter sets out the following: On December 22, 2004, Firtch contacted Henry to report that appellant had used Head Start's name fraudulently. Firtch said that several of the Burnham Brown donated gifts were unaccounted for, appellant added nine families to the original list and the original list had been rewritten. Firtch represented that toys and gift cards amounting to several hundred dollars were missing. The February 3 letter also states, "As a result of your fraudulent acts and your commitment of an act to the prejudice of the public service you are being terminated." The letter lists eight documents relied on in making the determination to terminate appellant.[3] The letter states that appellant has the right to respond orally or in writing and to request representation by the union or a representative of her choosing. To appellant's knowledge, the February 3 letter was never published in a newspaper or magazine and it was only seen by "Gibson, [e]mployee relations, personnel, the union, Usana Pulliam,[4] . . . Youngdahl, [and] former City Administrator Deborah Edgerly."

On April 28, 2005, Edgerly sent appellant a letter stating that appellant's employment was terminated effective May 6 for "Misconduct" described in the February 3 letter and "Engaging in acts that prejudice the public service." The letter also sets out the following: After receiving a list from Head Start containing 34 names to receive the Burnham Brown gifts, appellant altered the list and added nine additional families' names to it. Thereafter, based on appellant's representation, Burnham Brown bought the gifts according to the altered list. Not all of the donated gifts were actually delivered; many

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3 The eight documents are not included in the joint appendix before us.

4 Pulliam's role is not identified in the record before us.

gifts were missing, including several hundred dollars worth of store gift cards. In addition, toys, a radio and a gift bag containing clothing were also missing. At a March 16 *Skelly* hearing,[5] appellant admitted adding nine additional families' names to the original list. It is respondent's position that appellant engaged in misconduct and committed acts that prejudice the public service. As a result, Head Start's reputation and credibility in the donor community had been jeopardized, which could result in fewer donors and donations for needy Head Start families. Edgerly concurred in the recommendation to terminate appellant and stated that appellant could file a grievance or submit her appeal directly to the Civil Service Board.

Thereafter, appellant filed a grievance under the collective bargaining agreement governing her employment. In December 2006, respondent unilaterally ended the grievance proceeding by agreeing to reinstate appellant's employment and offering to pay her lost compensation.[6]

The First Amended Complaint

On May 16, 2008, appellant filed a first amended and operative complaint (FAC) against respondent alleging a single cause of action for defamation. The FAC alleges that respondent[7] falsely stated that appellant had misappropriated property intended for participants in the Head Start program, and terminated her due to the alleged misappropriation.[8] "By these statements . . . , [respondent] caused to be published the false and unprivileged communications tending directly to injure [appellant] in her business, professional and personal reputation." The FAC alleged the statements were published with express and implied malice, and respondent's liability was predicated on

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5 *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

6 The record before us does not disclose the reasons for respondent's decisions to terminate the grievance proceeding and reinstate appellant.

7 In an apparent typographical error, the FAC states, "*Defendant's* employer falsely stated that Plaintiff had misappropriated property intended for participants in the Head Start program."

8 The FAC did not mention any statements by respondent regarding appellant's drug use.

Government Code section 815.2 based on the torts of its employees within the scope of employment.[9]

Summary Judgment Motion

Respondent moved for summary judgment on the following grounds: (1) respondent is immune from liability under Government Code section 815; (2) the statements contained in the two notice of termination letters sent to appellant are absolutely and qualifiedly privileged under Civil Code sections 47, subdivisions (a), (c)(2) and (c)(3); (3) any statements made by respondent's employees in response to inquiries during the course of the investigation are privileged; (4) alleged statements made by Gullatt that gifts donated from Burnham Brown were missing from the bags when she received them did not accuse appellant of stealing them; and (5) Gullatt's statement regarding her opinion that appellant was on drugs is not slanderous because it was true.

Appellant opposed the summary judgment motion on multiple grounds. First, respondent's failure to produce four deponents for deposition was "highly prejudicial," necessitating either denial of the summary judgment motion or a continuance of the summary judgment hearing. In support, she submitted the declaration of her counsel, Michael Guta, stating that although he served four of respondent's employees with notices of deposition for August 13, 2009, respondent failed to produce the noticed witnesses for deposition. Guta's declaration states that respondent stipulated to an extension of discovery but refused to continue the summary judgment hearing. Guta states that the depositions are necessary to ascertain the state of mind of the decisionmakers leading to appellant's termination, and at least 15 days are necessary for Guta to prepare a motion to compel depositions. Second, as a governmental entity, respondent is not immune from defamation claims. Third, respondent could not meet its burden of establishing the truth of the statement that appellant had stolen property meant

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9 The FAC does not allege a cause of action for wrongful termination and does not allege that the defamation cause of action is based on the statements regarding appellant's drug use.

for Head Start families. Fourth, respondent is liable for the foreseeable republications of its defamatory statement that appellant was guilty of fraud. Fifth, issues of fact exist as to whether respondent was reckless in making the alleged defamatory statement, thereby defeating respondent's claim of privilege.

In support of her alleged recklessness argument, appellant submitted a declaration by her relating that, in January 2003, respondent agreed to provide her with an ergonomically correct workstation. Thereafter, respondent contested and delayed implementation of her workstation modification. On January 14, 2005, respondent was ordered to provide appellant with an ergonomically correct workstation. In early December 2006, shortly before the hearing on her grievance protesting her termination, respondent rescinded its decision to terminate her and she returned to work.

In granting summary judgment, the court concluded no triable issue of fact exists that the statements attributed to Edgerly are absolutely privileged under Civil Code section 47, subdivision (a), and the statements attributed to Edgerly, Youngdahl, Gullatt, Williams-Reynolds, and Gibson are qualifiedly privileged under Civil Code section 47, subdivision (c). The court also concluded that appellant had failed to present evidence establishing actual malice necessary to overcome the qualified privilege. The court granted summary judgment as to Gullatt's statement that she believed appellant was "on drugs" because that statement was not mentioned expressly or impliedly in the FAC.

The court rejected respondent's assertion of immunity from liability for the libel and slander of its employees. It also denied appellant's request for a continuance of the summary judgment hearing under Code of Civil Procedure section 437c, subdivision (h). The court concluded that since appellant filed her original complaint on January 30, 2008, the summary judgment motion was filed on June 1, 2009, and appellant's counsel did not begin serving deposition notices until August 2009, appellant was not denied an opportunity to conduct discovery to oppose the summary judgment motion.

DISCUSSION

I. *Standard of Review*

Summary judgment is properly granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) As to each claim framed by the complaint, the defendant moving for summary judgment must present facts to negate an essential element or to establish a defense; only then will the burden shift to the plaintiff to demonstrate, by a responsive separate statement and admissible evidence, the existence of a triable material issue of fact. (*Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263, 268; *Rosenblum v. Safeco Ins. Co.* (2005) 126 Cal.App.4th 847, 856.) In ruling on the summary judgment motion, the trial court must draw all reasonable inferences from the evidence in favor of the opposing party. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) On appeal, we review the trial court's grant of summary judgment de novo. (*Id.* at p. 860.)

" 'Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage.' [Citation.]" (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 27.) " 'Summary judgment is a favored remedy in defamation . . . cases due to the chilling effect of protracted litigation on First Amendment rights. [Citation.] "[T]he courts impose more stringent burdens on one who opposes the motion and require a showing of high probability that the plaintiff will ultimately prevail in the case. In the absence of such showing, the courts are inclined to grant the motion and do not permit the case to proceed beyond the summary judgment stage." [Citations.]' [Citations.]" (*Alszeh v. Home Box Office* (1998) 67 Cal.App.4th 1456, 1460.)

II. *Appellant's Request for a Continuance Was Properly Denied*

Appellant contends the court erred in failing to deny the summary judgment motion on the ground that she was denied discovery, or in failing to grant a continuance under Code of Civil Procedure section 437c, subdivision (h), which provides: "If it

appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due."

Appellant relies on *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389 (*Bahl*) for the proposition that Code of Civil Procedure section 437c, subdivision (h) "mak[es] continuances—which are normally a matter within the broad discretion of trial courts—virtually mandated ' "upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion." [Citation.]' [Citation.]" (*Bahl*, at p. 395.) However, "[c]ontinuance of a summary judgment hearing is not mandatory . . . when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under [Code of Civil Procedure,] section 437c, subdivision (h). [Citations.]" (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254 (*Cooksey*).)

A declaration in support of a request for continuance under Code of Civil Procedure section 437c, subdivision (h) must show " '(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]' [Citation.] ' "The purpose of the affidavit required by Code of Civil Procedure section 437c, subdivision (h) is to inform the court of outstanding discovery which is necessary to resist the summary judgment motion. [Citations.]" ' [Citation.] 'It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show "facts essential to justify opposition may exist." ' [Citation.]" (*Cooksey, supra,* 123 Cal.App.4th at p. 254.)

The trial court's decision was proper for two separate reasons. First, appellant's declaration in support of the motion failed to explain why the discovery sought could not

have been obtained sooner. To obtain a continuance in order to conduct additional discovery, counsel must show diligence in pursuing past discovery. (*Cooksey, supra,* 123 Cal.App.4th at p. 255; *A & B Painting & Drywall, Inc. v. Superior Court* (1994) 25 Cal.App.4th 349, 356-357; but see *Bahl, supra,* 89 Cal.App.4th at p. 397.) As noted by the trial court, appellant's operative complaint was filed in May 2008, and respondent's summary judgment motion was filed on June 1, 2009, for a hearing to be held on August 31, 2009. However, appellant's counsel waited until August 3, 2009, to send out the deposition notices. In addition, appellant's counsel's declaration fails to establish good cause for a continuance. The declaration states merely that counsel "seek[s] to determine the state of mind of the decisionmakers leading to the termination of [appellant]," and attaches the deposition notices regarding Williams-Reynolds, "Lewis" Gomes,[10] Don Templen, and "Person Most Knowledgeable." However, the declaration does not establish that the facts to be obtained are essential to opposing the motion, or identify any specific facts expected to be forthcoming from the deponents. Moreover, nothing in the declaration or the record before us explains who Templen or "Person Most Knowledgeable" is in relationship to appellant or this action. For these reasons the court did not abuse its discretion in refusing to continue the summary judgment hearing and in deciding the motion on the merits.

III. *Edgerly's Statement Was Privileged*

Appellant next contends the court erred in concluding that Edgerly's statement, made in her April 28, 2005 notice of termination letter to appellant, was absolutely privileged under the "official duty" privilege of Civil Code section 47, subdivision (a).[11]

The official duty privilege applies to all state and local officials engaged in the policymaking process and to " 'any statement by a public official, so long as it is made (a) while exercising policy-making functions, and (b) within the scope of his [or her]

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[10] We assume "Lewis" Gomes is the same person as Lois Gomes.

[11] Civil Code section 47, subdivision (a) provides: "A privileged publication or broadcast is one made: [¶] (a) In the proper discharge of an official duty."

official duties.' " (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 614, quoting *Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 501 (*Royer*).) The purpose of this privilege is to ensure that policymaking officials exercise their best judgment in the performance of their duties without fear of general tort liability. (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413; *Royer,* at p. 500.)

Article V, section 500 of the Charter of the City of Oakland provides, in relevant part: "The Mayor shall appoint a City Administrator, subject to the confirmation by the City Council, who shall be the chief administrative officer of the City."[12]

No evidence was presented that Edgerly's April 28, 2005 letter notifying appellant of respondent's intent to terminate her and notifying appellant of her opportunity to file a grievance was not related to a legitimate policymaking function of a city administrator, or that Edgerly was not acting in the proper discharge of an official duty in writing the letter to her. Thus, the court correctly concluded that Edgerly's statement was absolutely privileged.

IV. *Statements by Youngdahl, Gullatt, Williams-Reynolds and Gibson Are Subject to the Qualified Privilege*

Appellant next argues the court erred in concluding that the statements by Youngdahl, Gullatt, Williams-Reynolds, and Gibson are subject to the qualified privilege under Civil Code section 47, subdivision (c).[13]

Civil Code section 47, subdivision (c) provides, in relevant part: "A privileged publication or broadcast is one made: [¶] . . . [¶] (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. . . ."

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[12] <http://library.municode.com/HTML/16308/level1/CHAR.html> as of July 12, 2010.

[13] Though respondent takes the position that Youngdahl, like Edgerly, was subject to the *absolute* privilege, we address the trial court ruling challenged by appellant.

Civil Code section 47, subdivision (c) "extends a conditional privilege against defamatory statements made without malice on subjects of mutual interest. [Citation.]" (*Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1368, fn. omitted (*Noel*).) "If malice is shown, the privilege is not merely overcome, it never arises. [Citation.] However, if the privilege does arise, it is a complete defense. [Citation.]" (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 740.)

Because an employer and its employees have a common interest in protecting the workplace from abuse, an employer's statements to employees regarding the conduct of an employee fall within the common-interest privilege. (*Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 995-996; *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 847.)

Based on the evidence before us, the statements made by respondent's employees, Youngdahl, Gullatt, Williams-Reynolds and Gibson, regarding appellant's conduct fall within the ambit of the common-interest privilege. Head Start's personnel department asked Williams-Reynolds and Gullatt to give statements regarding the missing gifts. Gomes met with Head Start staff members regarding the missing gifts. Gibson alerted Henry of Firtch's allegation that some of the donated gifts were missing, but appellant stated she did not know whether Gibson accused her of taking the gifts when she became aware they were missing. On December 23, 2004, Youngdahl, Henry, Pulliam and City Attorney Mark Mardolly met with Firtch, who said that toys and gifts amounting to several hundred dollars were missing from the originally donated gifts.

To defeat summary judgment, appellant was required to establish that statements made by Youngdahl, Gullatt, Williams-Reynolds and Gibson were made with actual malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203-1204; *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1350.) Appellant appears to argue that triable issues of fact exist as to whether the allegedly defamatory statements were made with actual malice. "Insofar as the common-interest privilege is concerned, malice is not inferred from the communication itself. [Citation.] ' "The malice necessary to defeat a qualified privilege is 'actual malice' which is established by a showing that the publication was

motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights (citations)." [Citations.]' [Citations.]" (*Noel, supra,* 113 Cal.App.4th at p. 1370.)

Appellant cites *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244 for the proposition that "[a] failure to investigate may, in an appropriate case, indicate that the publisher had serious doubts regarding the truth of the publication." She argues that "on the very eve of when [respondent] would have to present [its] evidence to substantiate the scurrilous charge [that appellant stole the Christmas gifts, respondent] unilaterally reinstated [her] to a position of family advocate . . . ."[14]

" '[T]here is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence. [¶] Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.' " (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 35, quoting *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 254.)

Here, appellant did not meet her burden of proof of establishing that statements by Youngdahl, Gullatt, Williams-Reynolds, and Gibson were made with actual malice. She presented no evidence establishing a failure to investigate, recklessness or that any of the statements made were motivated by hatred or ill will towards her. Respondent's evidence established that the statements were made in the course of an investigation into the missing gift items. Without more, the mere fact that respondent rescinded appellant's termination and reinstated her does not establish actual malice.

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14 For the first time on appeal, appellant asserts that "the true motivation for the scurrilous charge of theft was to avoid the requirements imposed by a workers' compensation judge to ergonomically modify [appellant's] work-station." Because this assertion was neither alleged in the FAC nor argued below, we decline to consider it on appeal. (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11, fns. omitted.)

V. *Respondent Did Not Assert a Truth Defense to the Challenged Statements*

Next, appellant contends respondent did not meet its burden of proof of establishing the truth of the statement that she stole property meant for the Head Start program. The short answer to appellant's contention is that respondent did not assert this defense regarding any statements that appellant stole the missing gifts intended for the Head Start program. As we noted above, any such statements were privileged.

VI. *Foreseeable Republication*

Finally, in reliance on *McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787 (*McKinney*), appellant contends respondent is liable for the foreseeable republications of its defamatory statements. In *McKinney*, the plaintiff argued that since the defendants allegedly gave false reasons to the plaintiff for his dismissal, it must have been foreseeable to the defendants that the plaintiff "would be under a strong compulsion to republish the statements to prospective employers upon their inquiry." (*Id.* at p. 795.) The trial court dismissed the action because the plaintiff himself had republished the defamatory statements. (*Id.* at p. 798.) The appellate court reversed, finding a triable issue of fact on the issue of publication. (*Ibid.*) The court adopted a theory of compelled republication that applied in two contexts. First, where the originator had reason to believe a letter sent to the defamed containing libel will fall into the hands of a third party before the defamed reads it. (*Id*. at p. 796.) The second context "is where the originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person *after* he has read it or been informed of its contents. [Citations.]" (*Ibid*.) "The rationale for making the originator of a defamatory statement liable for its foreseeable republication is the strong causal link between the actions of the originator and the damage caused by the republication. This causal link is no less strong where the foreseeable republication is made by the person defamed operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed." (*Id*. at pp. 797-798.)

Appellant's assertion fails for a variety of reasons. First, because appellant did not allege foreseeable republication in her FAC we need not address it. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 [the complaint limits the issues to be addressed at the motion for summary judgment]; *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4 [appellate court need not address issues not raised in complaint].) Second, as we noted above, respondent's statements are either absolutely privileged under Civil Code section 47, subdivision (a) or qualifiedly privileged under Civil Code section 47, subdivision (c). Appellant does not assert that defamatory republication survives a finding of privilege. The issue of the applicability of the privilege of Civil Code section 47 was not raised in *McKinney*. " 'It is axiomatic that cases are not authority for propositions not considered.' [Citation.]" (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388, fn. omitted.) Finally, we note that, recently, in *Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843, 854-855, Division One of this court stated: "California cases that have discussed the exception created in *McKinney* have uniformly involved an actual republication. [Citations.]" Appellant has neither alleged nor asserted the actual republication of any statement.

We conclude summary judgment was properly granted.

DISPOSITION

The summary judgment is affirmed. Costs to respondent.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.